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FARM CREDIT ADMINISTRATION
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SUMMARY OF CASES

RELATING TO

FARMERS' COOPERATIVE ASSOCIATIONS

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Patronage Refunds Held Nondeductible

In the case of American Box Shook Export Association v. Commissioner of Internal Revenue, 4 T.C. 758, the principal issue was whether any of the amounts received by the association during the tax year in question were taxable to it as its income. In the event that this question was decided in favor of the Commissioner, there was the further question of whether the sum of $7,559.11 paid by the association to its members during the taxable year on a patronage basis might properly be deducted from the gross income of the association in computing the income taxes of this nonexempt association.

The association was incorporated under the general corporation laws of the State of California, but the court held that "The statutes under which an association is organized are not controlling, however, if it is actually organized and operates as a true cooperative."

The association was engaged in the purchase of box shook, namely, material used for the manufacture of wooden boxes which the association sold exclusively in export. The association had twelve members and it purchased shook from its member stockholders only, all of whom were engaged in the manufacture or distribution of lumber products, or both. The association did not purchase shook from its members on any standard rate or price basis.

> ". . . When an order for shook is placed by a foreign customer, the petitioner first obtains the necessary data from the customer, including information as to specifications, shipping schedule, and quantity. It then contacts its members to ascertain the 'minimum satisfactory price' at which the members would agree to handle the particular order.
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> "These negotiations with the members usually are not reduced to writing. The petitioner conducts its business with its members in an informal manner, much of it being handled by telephone.
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> "After it obtains the minimum price at which the members will produce the shook, the petitioner endeavors to secure a higher price from the customer. This usually amounts to an additional margin of from 8 percent to 10 percent of the original 'minimum' price. It is added to provide against unforeseen items of expense.
>
> "The members bill the petitioner for shook sold on the basis of the 'minimum' price and the petitioner settles with them currently on that basis at a discount. This is done since the final profit from the transaction can not be determined for some time, owing to the distances which the products must travel and the unforeseen expenses which may arise."

Neither the articles of incorporation nor the bylaws of the association required that amounts received by it in excess of the cost of goods sold should be distributed to its members upon a patronage basis. There was

an understanding, however, between the association and its members "that any amounts received in excess of actual cost, with the exception of amounts placed in a reserve for anticipated claims, is to be returned to them." At the close of a fiscal year the directors of the association determine the amount which could be distributed without endangering the reserve fund.

> ". . . These amounts were distributed to the members upon the basis of the amount of board feet of shook which each shipped during the year.
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> "On or about May 28, 1941, the petitioner made distributions to its members totaling $7,559.11 out of earnings of that year.
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> "In its income tax return the petitioner reported total income of $50,865.03 and net taxable income of $13,317.66. It did not include in its gross income either the amounts distributed to the members during that year or the sum of $4,000 entered in its books as a reserve for anticipated claims. It now concedes the nondeductibility of the latter item in the event it is determined that the corporation is taxable."

It is apparent that the association contended that it was a cooperative association and that all amounts which it received over and above operating costs and expenses were "the income of its members" and not the income of the association. The court said:

> "In order to be a true cooperative, there must be a legal obligation on the part of the association to return to the producers, on a patronage basis, all funds received in excess of the cost of the goods sold. Such an obligation may arise from the association's articles of incorporation, its bylaws, or some other contract."

It will be recalled that in the case of United Cooperatives, Inc. v. Commissioner, 4 T.C. 93, the court specifically held that amounts which the cooperative had received and retained could be excluded in determining the amount of the income taxes of the association because the association in its organization papers was under a firm obligation to account to its members on a patronage basis for all such amounts; and because the board of directors of the association had no option or discretion in the matter. In other words, the right of the members to an accounting for such amounts was, under the organization papers of the association, held to be entirely independent of any action by the board of directors. The court said, however, in the instant case that there was "no evidence of such a legal obligation" and further said:

> ". . . There was no provision in either its articles or bylaws requiring the petitioner to distribute all its profits to its members on a patronage basis. Neither were there any express written contracts with the members to that effect. The most we find was an 'understanding' between the petitioner and its members that all sums received in excess of the cost of selling the shook and in excess of

the amounts placed in the reserve for anticipated claims should be returned to the members.

"It does not appear, however, that this understanding was carried out in practice. During the year in controversy the petitioner made distributions to its members of $7,559.11 and had in its reserve the sum of $4,000. Yet it reported a taxable income, after deducting both of these items, of $13,317.66. What disposition was to be made of this amount, we do not know. There is nothing in the record to show that it could not be used for the payment of dividends on the stock, or for any other purpose. Other than the amounts actually distributed to the members, of which we shall speak later, there is nothing to show that the petitioner's earnings were not its own, which it could use for any ordinary corporate purpose."

The Tax Court distinguished the case of San Joaquin Valley Poultry Producers' Association v. Commissioner, 136 F. 2d 382, in which certain reserves held by the association were found to belong to the members of the association, because of the differences in the statutes under which the associations were organized and in their organization papers. In this connection the court said:

"Here, however, as we have noted, neither the statute under which it was incorporated, its articles of incorporation, its bylaws nor any other contract forbade the petitioner from having income of its own. Under such circumstances, it can not be said that the petitioner's income was actually that of its members."

After holding that the money in question was actually the income of the association and therefore taxable to it, the court considered the question of whether the $7,559.11 which had actually been distributed to its members on the basis of the number of board feet of shook which each member had furnished to the association, might be excluded in determining the amount on which the association was required to pay income taxes. The court said:

". . . Deductions are available to taxpayers only by virtue of statutory provisions. Not every payment out of income creates a legal deduction. Here again the answer turns upon whether or not the right of the members to these amounts arises by reason of the corporate charter or bylaws or some other contract, and is not dependent upon some subsequent corporate action taken by the officers or directors. United Cooperatives, Inc., supra; Midland Cooperative Wholesale, supra. The petitioner contends that such a right inhered in its members and that it is entitled to the deduction. The respondent asserts that the petitioner was under no legal obligation to make the payments and that the distributions were in the nature of dividends, hence not available as statutory deductions.

"As we have indicated above, there was nothing in the petitioner's articles of incorporation or bylaws imposing upon it the obligation

to distribute its excess revenue among its members. The question is, therefore, narrowed to whether or not such an obligation existed because of some other contract or contracts between the petitioner and its members.

* * * * * *

"It is apparent from the record also that no amounts were distributable to the members without prior action on the part of the petitioner's board of directors. . . .

* * * * * *

"The taxpayer points to no statute authorizing the claimed deductions. Clearly they are not deductible expenses. The petitioner was under no obligation to make distributions to its members until the board of directors had so acted. Whether the payments were in the nature of dividends, we need not decide. But see Fontana Power Co., 43 B.T.A. 1090; affd., 127 Fed. (2d) 193; Juneau Dairies, Inc., 44 B.T.A. 759. We are of the opinion that the petitioner is not entitled to the deduction in any event and that the respondent's determination must be sustained."

The Tax Court of the United States in brief held that inasmuch as the association was not under a firm mandatory obligation to account to its members on a patronage basis for any amounts over operating costs and expenses, that even amounts that it had distributed on a patronage basis were not excludable in determining the amount on which the association was required to pay income taxes, and that the amounts which the association had carried to reserves was likewise not excludable. It was the discretion which the board of directors had in these matters that kept these amounts from being excludable or deductible.

This case makes it clear that The Tax Court of the United States will not permit a nonexempt association to deduct or exclude patronage refunds that are paid in pursuance of discretion exercised by the board of directors of an association. A contractual obligation to make such refunds, on which a suit could be maintained by a member, appears to be necessary to assure that such refunds may be deducted or excluded. In the case of the usual nonexempt cooperative association a member could not successfully sue to require the payment of a patronage refund.

Reparations - Perishable Agricultural Commodities Act

In the case of American Fruit Growers, Inc. v. Clowe & Davis, Inc., PACA Docket No. 4381, decided October 19, 1945, by Thomas J. Flavin, Assistant to the Secretary of Agriculture, it was held that the buyer's failure to order shipment of the commodity within a reasonable time, no specific time being stated in the contract to buy, constituted a rejection of the commodity without reasonable cause and entitled the seller to an award of reparation under the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a et seq.), in the amount of the sale price less the amount

received by the seller on the resale of the commodity. An order of reparations was therefore made in favor of American Fruit Growers, Inc., in the amount of $2,091.69, with interest thereon at 5 percentum per annum from November 30, 1943, until paid.

What Is Mutual Insurance

In the case of Keystone Mutual Casualty Company v. Driscoll, 137 F. 2d 907, it appeared that the casualty company brought an action against William Driscoll, Collector of Internal Revenue for the Third District of Pennsylvania, seeking a refund of income taxes which the casualty company had paid for the years 1936, 1937, and 1938.

The casualty company asserted that it was exempt from the payment of income taxes under 26 U.S.C. 101, paragraph (11), which reads as follows:

> "The following organizations shall be exempt from taxation under this title --
>
> * * * * * *
>
> "(11) Farmers' or other mutual hail, cyclone, casualty, or fire insurance companies or associations (including interinsurers and reciprocal underwriters) the income of which is used or held for the purpose of paying losses or expenses."

The question for decision was whether the casualty company was a mutual company within the meaning of the foregoing quotation. The District Court held that the casualty company was not a mutual one, and this decision was affirmed by the Circuit Court of Appeals. The following quotations from the opinion in this case show the basis therefor:

> "The District Court held that the appellant was not entitled to the exemption provided by the sections of the federal statutes referred to in this opinion and that such statutory provisions granting exemptions, were to be construed strictly. Referring to decisions construing the statutes under consideration or similar acts, the District Court stated, 44 F. Supp. 658: 'The consensus of the opinions is that the section contemplates an association of individuals whose sole object is to obtain insurance for themselves at cost, and, if amounts greater than necessary cost had been collected, that excess was to be returned to members in some form. The maintenance of a reasonable reserve is not prohibited, but it must be for the one purpose of paying losses and expenses, with ultimate return of excess to members. In other words, the association is for the benefit of the members, and not the members for the benefit of the members, and not the members for the benefit of the association.'
>
> "During the tax years now under consideration, the appellant borrowed $90,000 from its bank at 1 1/2% interest and bought a $100,000 Government bond with an interest rate of 2-3/4%. The appellant admits that this particular transaction was beyond the usual scope of the activities of a mutual company but contends that this was

de minimis and that for this reason alone it should not be denied its exemption as a mutual company. Other facts, however, throw further light on the appellant's attitude toward its members. It decreased its indebtedness to the lending bank by about $40,000 in a comparatively short time. During 1938 it sold securities which it held and realized profits in excess of $13,000. The court below, however, laid emphasis upon this transaction and stated, id. 44 F. Supp. at page 659, 'It is not the function of a mutual casualty company under the exemption statute, wise as the transaction may be, to borrow money and pay out gains therefrom to policyholders--who are entitled to proper returns from their premiums, but not to returns from moneys otherwise acquired by the company.', citing MacLaughlin v. Philadelphia Contributionship, etc., 3 Cir., 73 F. 2d 582, 584.

"The appellant cites the legislative history of the statutes and points out that the Revenue Act of 1926, 44 Stat. 40, § 231 (11) 26 U.S.C.A. Int. Rev. Code § 101 (11), was the first statute to contain the exact language set out in Section 101 (11) of the Revenue Act of 1938, 52 Stat. 481. Section 101 (11) of the Revenue Act of 1936, 49 Stat. 1648, is identical in language with the corresponding section of the Revenue Act of 1938. The appellant points out that Section 231 (10) of the Revenue Act of 1924, 43 Stat. 282, 26 U.S.C.A. Int. Rev. Acts, page 38, exempted '* * * mutual * * * casualty * * * insurance companies * * *; but only if 85 per centum or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses; * * *.' It is correct, as the appellant points out, that the Revenue Act of 1926 removed the exemption of casualty insurance companies from the provisions of Section 231 (10) and placed that exemption in Section 231 (11), 44 Stat. 40, which contains no requirement that 85 per centum of the income be collected from members.

"The Reports of the House Ways and Means Committee and the Senate Finance Committee (1939-1 (Part 2) Cumulative Bulletin 321, 349-350) state: 'It so happens that in the case of insurance companies of a type covered by the new subdivision (11) of this Section the losses vary from year to year, and consequently in certain years the assessments collected are not used up in the payment of losses and expenses and no additional money is required to be collected for the payment of losses in the succeeding year.' The appellant contends that the words quoted constituted recognition by Congress that money collected by way of premiums by an insurance company one year may be used by it to pay losses incurred upon policies written thereafter and the company still be entitled to exemption under the statutes. This legislative history does not indicate, however, that it was the intention of Congress that an insurance company claiming to be a mutual company may build up a large reserve as if it were an ordinary casualty company, meanwhile making no returns of premiums to members in accordance with the principle of redundancy, and remain exempt within the provisions of the statutes. That the appellant is not in fact operating as a purely mutual company, is made all the more apparent when the provisions of Section 1 of Article IX and Section 1 of Article X of the appellant's by-laws are considered.

"Article X, Section 1, provides that in the event of the appellant's dissolution any surplus shall be distributed to those persons who are policyholders at that time. This provision would deprive those who had previously held policies in the company of the surplus properly attributable to them and confer an unearned increment upon subsequent policyholders. Article IX, Section 1, of the by-laws provides that the board of directors shall have absolute discretion to set aside a 'permanent safety fund' and that the board of directors each year may set aside for such fund so much of the net surplus of the appellant as it might deem proper and reasonable. Article IX further provides, 'Such fund shall belong to the Company, shall not be divided to or among the members thereof, nor shall any member ever be entitled to demand or receive any portion thereof while said Company continues to transact business except on payment of losses, nor shall any person after ceasing to be a member of the Company be entitled to have or receive any portion thereof.' These provisions contemplate the establishment of a fund which shall belong to the insurance company as an entity and not to its members. Although this fund may actually be used for the purposes of paying losses or expenses in accordance with the Revenue Acts of 1936 and 1938, the company is not required to devote the fund to these purposes. Thus it cannot be said that the fund is 'held' under the terms of the Revenue Acts for those purposes which are the only legitimate purposes of a mutual company entitled to income tax exemption.

"The intent of the company is further clarified by the testimony of Kann. The company was attempting, he declared, to build up sufficient reserves to meet the requirements for doing business in other states and so expand its activities. Although such planning may have been prudent from a commercial viewpoint, it looked toward expansion of the company's business in other states rather than to the lowered cost of insurance for existing policy holders. The court below aptly made the following finding of fact: 'Plaintiff has pursued a policy of retaining and accumulating its net earnings in order to strengthen its financial position and to enable it to expand its business.'

"Although this finding of fact may seem to be in conflict with the court's finding that the amount of income retained as reserve by the appellant was not unduly large in view of the Pennsylvania legal requirements, the conflict is apparent rather than real. The reserves retained were not unduly large under Pennsylvania law. However, the intent of the appellant is crucial under the federal law and though the amount might well be legitimate the purpose for which it was retained violates the strict requirements of the exemption section for mutual companies of the Revenue Acts of 1936 and 1938.

"This court stated in Driscoll v. Washington County Fire Ins. Co., 3 Cir., 110 F.2d 485, 490: 'The essential of mutuality is membership. * * * Incident to membership is the right to redundancy and the burden of assessment. As was stated by the Supreme Court in Penn Mut. Life Ins. Co. v. Lederer, supra, 252 U.S. [523], 525,

> 40 S.Ct. 397, 64 L.Ed. 698, it is the essence of mutual insurance that the excess in the premium over the actual cost as ascertained shall be returned to the policyholders.' See also MacLaughlin v. Philadelphia Contributionship, supra, 73 F.2d at page 584. We hold that the appellant is not such a mutual company as was contemplated by Congress as being entitled to avail itself of the exemption."

Attention is called to the fact that the court stressed that a mutual company must have a way of returning "excess" to its members. Indeed, in the quotation from the decision of the Supreme Court of the United States given above, it is said that "it is the essence of mutual insurance that the excess in the premium over the actual cost as ascertained shall be returned to the policyholders."

It should be noted that the court emphasized that the question for decision was not whether the casualty company was operated in accordance with the law of Pennsylvania, but whether the casualty company was a mutual company within the meaning of the provisions for exemption under which the casualty company claimed to be exempt.

The court was impressed by the fact that the bylaws of the casualty company provided that in the event of dissolution any surplus should be distributed to those persons who were policyholders at that time. The court apparently felt that this was inconsistent with the company being a mutual one, because the court said: "This provision would deprive those who had previously held policies in the company of the surplus properly attributable to them and confer an unearned increment upon subsequent policyholders."

Apparently the court was proceeding on the theory that amounts carried to reserves or surplus in any year should be allocated to the policyholders of that year so that they might at least have a possibility of having them returned to them in the future. This, of course, is consistent with the holding of the Circuit Court of Appeals in the case of Fertile Cooperative Dairy Association v. Huston, Collector of Internal Revenue, 119 F. 2d 274.

Federal Power Commission Denies License

The First Iowa Hydro-Electric Cooperative applied to the Federal Power Commission for a license to construct a power project on Cedar River in the State of Iowa.

> "The Commission dismissed the application for the reason that, 'The applicant has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act * * *.'"

An appeal was then taken and in First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 151 F. 2d 20, the court affirmed the decision

of the Federal Power Commission, emphasizing that the cooperative had not complied with the applicable laws of Iowa before applying to the Commission for a license.

When Is A Cooperative Not Organized Or Operated For Profit?

In the case of Greene County Rural Electric Cooperative v. Nelson, decided by the Supreme Court of Iowa, 12 N.W. 2d 886, the question was presented of whether certain rural electric cooperatives were "cooperative corporations or associations which are not organized or operated for profit." These rural electric cooperatives brought suit to enjoin the State Tax Commission from assessing their property under Chapter 340 of the Iowa Code of 1939. The lower court granted the injunction and an appeal was then taken by the Tax Commission. The cooperatives asserted that they were organized "upon the cooperative plan and not for profit."

> "Chapter 340, Code 1939, provides that the state tax commission shall determine the actual value, for the purposes of taxation, of all electric transmission lines of companies, defined by Section 7089 as those owning or operating such lines within the state and wholly or partly outside cities and towns, 'except cooperative corporations or associations which are not organized or operated for profit.'".

The principal question for decision by the court was whether the rural electric cooperatives came within the exception. All of the cooperatives concerned were organized in 1937 under Chapter 390.1 of the Code of Iowa for 1939. "This chapter permits the organization of cooperatives for profit as well as those not for profit." The following quotation from the opinion shows how the electric cooperatives were organized:

> "Plaintiffs' articles of incorporation are in evidence. The parties stipulated regarding their operations as follows:
>
> "'It is further stipulated and agreed by the parties hereto that the facts are, which shall be considered as the evidence in this case, that in the operation of the business of the plaintiffs in this case, and cooperative associations similarly situated, each member holds one membership only, that is by a certificate of membership, has only one vote in the management of the business of the plaintiffs, and cooperative associations similarly situated; that all members are required to be patrons and business is done with the members only; that no dividends or interest has ever been paid by the plaintiffs or other cooperative associations similarly situated to members on the membership or the issuing price thereof; that the earnings or excess charges are distributable to the members only on a patronage basis in proportion to the business done by the members through the cooperative corporation and other corporations similarly situated.'

"The articles of incorporation are consistent with the method of operation above set forth. We are satisfied that plaintiffs are not organized or operated for profit. There is no return on capital invested and can be none. The membership fee of $2.50 is nominal and nothing more than a deposit to establish credit, such as many public utilities require of their patrons. The income is that received for business done with members. Only members are dealt with. Any net earnings are returned on the basis, not of membership or investment, but of business done. It is literally no more than a return of an overcharge originally assessed to provide a margin of safety in the operation of the business. Cooperative corporations and associations so organized and operated have been recognized repeatedly as being not operated for profit."

As stated in the foregoing quotation, the court specifically held that the cooperative associations that were organized and operated in the manner set forth in the quotation were not "operated for profit." In support of its conclusion that these electric cooperatives were not operated for profit, the court said:

"In Hanna on 'The Law of Cooperative Marketing Associations', page 50, it is stated: 'The essential idea in the term "non-profit" is clearly that such corporations are not designed primarily to pay dividends on invested capital but to provide a system and method by which the member can effect the sale of his products.'

"In 'The Law of Cooperative Marketing', by Evans and Stokdyk, page 3, it is stated: 'The basic legal and economic principles of the cooperative scheme are limitation upon the voting power and restrictions upon alienation of voting stock or membership interests, thus preserving the dispersion of control and keeping the control within the class affected; limiting the use of proxies, thus fixing the responsibility upon the cooperators; the limitation of earnings upon invested capital, thus insuring the non-profit character of the scheme; and the distribution of earnings or savings upon a patronage basis, that is, according to the quantity or value of products marketed through the association by the respective members.'

"In 90 Univ. of Pa. Law Review, page 151, it is stated: 'A fundamental principle applicable to all cooperatives is the avoidance in the organization of entrepreneur profit. Patronage refunds, therefore, are not to be considered as a division of the profits. They are rather a return of the over-charge.'

"In United States v. Rock Royal Cooperative, 307 U.S. 533, 564, 59 S. Ct. 993, 1008, 83 L. Ed. 1446, 1465, the court states: 'The producer cooperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership cooperative and with limited profit to the stock cooperative. It is organized by producers for their mutual benefit.'"

Under the Iowa statutes the fact that the State Tax Commission was not authorized to assess the transmission lines of cooperative corporations or associations which were not organized or operated for profit, did not result in the property in question not being taxed. Instead of being taxed to the cooperatives, the interest of the members was assessed as part of the real estate served by the transmission lines. In this connection the following quotation is taken from the opinion:

> "The exception appearing in Section 7089 was inserted therein through the enactment of Section 17-a1 of S.F. 183 by the 40th Extra G.A. in 1924. The last sentence of this section was codified as Section 7102 of the Code. Sections 7089 and 7102 of the Code 1924, appear in identical form in the Code, 1939. By these sections cooperative corporations or associations not for profit are not assessed but the interests of the members are assessed as part of the real estate served by the transmission lines. As to corporations for profit, their property is assessed under Chapter 340 but Section 6944, subparagraph 20, exempts the capital stock from taxation."

Unemployment Taxes - Eight or More Employees

In the case of Glidden Rural Electric Cooperative v. Iowa Employment Security Commission, decided by the Supreme Court of Iowa, 20 N.W. 2d 435, the question for decision was whether the cooperative had eight or more employees. If it had eight or more employees it was admitted that the cooperative would be liable for unemployment compensation taxes under the statutes of Iowa.

The cooperative association employed certain construction companies as independent contractors to build transmission lines. If the employees of these construction companies could under the Iowa statute be held to be employees of the cooperative, then the cooperative would have eight or more employees, but it was only by adding the employees of the construction companies to the employees of the cooperative that it could be said the cooperative had eight or more employees. The following quotation from the opinion in this case sets forth the statutory basis for the contention that the employees of the independent contractors were, for the purpose of the statute, to be deemed employees of the cooperative:

> "... The assessment in the instant case is by reason of the provisions of section 1551.25, subsection E of said chapter, the material portion of which, so far as this appeal is concerned, provides as follows: 'Whenever any employing unit contracts with or has under it any contractor or subcontractor for any work which is part of its usual trade, occupation, profession, or business, unless the employing unit as well as each such contractor or subcontractor is an employer by reason of subsection "F" or section 1551.14, subsection "C", the employing unit shall for all the purposes of this chapter be deemed to employ each individual in the employ of each such contractor or subcontractor for each day during which such individual is engaged in performing such work.'"

In brief, if the "usual trade, occupation, profession, or business" of the cooperative could be said to be the construction of transmission lines, then from the standpoint of the statute the employees of the construction companies might be regarded as employees of the cooperative. In holding that the cooperative was not, as a part of its "usual trade, occupation, profession, or business" engaged in the construction of transmission lines, the court said in part:

> "Appellant and appellee are unable to agree as to the meaning of the word 'usual' in the statute. The appellant argues that in connection with the statute the word 'usual' means the same as the word 'regular' and is to be taken in its ordinary every day meaning and that the usual business of appellant is to distribute electricity. On the other hand, appellee argues that the word 'usual' as used by the legislature was in the sense of 'essential to', or a 'necessary part of' the business, or for the 'purpose' of such business, and that as in this case the transmission lines were essential to the distribution of electricity, their building was a part of the 'usual business' of appellant. We think that appellant's view as to the particular statute under construction is correct."

Three of the justices dissented, and apparently in some jurisdictions conclusions contrary to that in the instant case have been reached.

OPA - Bill of Particulars

In the case of Bowles v. Sebastopol Berry Growers Association, 4 F.R.D. 502, the Administrator of the Office of Price Administration sought to recover treble damages for alleged violations of the Emergency Price Control Act and averred that the association had sold frozen berries packed in containers at overceiling prices. The association made a motion for a bill of particulars, which was granted. In this connection the court said:

> "The Court believes that, in this case, as in that one, the motion for a bill of particulars should be granted. Paragraph IV of the complaint reads: 'That within one year last past defendant sold and delivered frozen berries, including blackberries, boysenberries and youngberries, packed in containers other than barrels, the maximum prices for which said sales and deliveries were fixed until August 6, 1943, under said Maximum Price Regulation No. 207 and after August 6, 1943 under said Maximum Price Regulation No. 409, at prices in excess of those established under said Maximum Price Regulations.'
>
> "Defendant is entitled to more specific and detailed information concerning these alleged overcharges. 'It is entitled to be informed with reference to when, where and to whom it is alleged to have sold blackberries, boysenberries and youngberries, and each of said types of berries, at prices in excess of those established under Maximum Price Regulations No. 207 and No. 409."

For other cases in which the OPA has been required to furnish bills of particulars, apparently under similar circumstances, see Bowles v. Jacobson, 4 F.R.D. 447, Bowles v. National Erie Corporation, 3 F.R.D. 469, and Bowles v. Flotill Products, 4 F.R.D. 499.

In certain other cases motions for bills of particulars have been refused. See Bowles v. Anderson, 4 F.R.D. 181, and Bowles v. Ohse, 4 F.R.D. 403.

Independent Contractor, Or Employee

In the case of Peterson v. Highland Crate Cooperative Association, et al., decided by the Supreme Court of Florida, 23 So. 2d 716, it appeared that the cooperative association entered into oral contracts with a logger by the name of Peterson under which he was to cut and haul logs from certain tracts of land. While engaged in the performance of this work a log was dropped on him and caused his death.

His widow then instituted proceedings under the Workmen's Compensation Act of Florida on account of the death of her husband while in the alleged employ of the cooperative. After a hearing the Deputy Commissioner made an award in favor of Mrs. Peterson, and on appeal to the Florida Industrial Commission it was affirmed by a vote of 2 to 1. The Chairman of the Commission dissented upon the ground that the deceased was not an employee but an independent contractor and hence was not covered by the Workmen's Compensation Act.

The case was then appealed by the cooperative to the Circuit Court, which reversed the award, holding that Peterson was an independent contractor. The case was then carried to the Supreme Court of Florida by the claimant. In affirming the judgment of the Circuit Court the Supreme Court stressed the fact that Peterson was free to do the work in question in any manner that he deemed best, and that he did not act under the supervision of the cooperative. Emphasis was also placed on the fact that he furnished his own equipment except for one machine which he rented from the cooperative, and that he employed his own help and had the sole right to hire and fire any and all of his helpers. The appellate court said in part:

> "For Peterson to comply with his agreement it was not necessary for him to actually perform any manual labor. He could have had all of it performed by servants selected, employed and paid by himself. The corporation had no control over him in this regard. The only control (which appears by implication) that the corporation might have had was to terminate his contract if his cutting and delivery of the logs to the corporation's trucks in the woods was not done in a satisfactory, workmanlike manner. But there is not shown to have been any oral reservation in the agreement of even this control. There is an implied obligation on everyone who undertakes to perform a contract that it will be performed in a good, workmanlike manner. The deceased was engaged in the business of logging and carried on more than one such contract with different parties at the same time. There was no time limit set

on either of the contracts. Payment under the agreement was made on the basis of the number of thousand feet of logs cut and loaded and in nowise on any time basis. We think that these factual conditions differentiate this case from the case of Sears, Roebuck & Co. v. Pixler, 140 Fla. 677, 192 So. 617. In that case Pixler agreed to do some painting for Sears, Roebuck & Co. but he was at all times under the direction and supervision of the Manager of the Sears Roebuck store where he was painting. He did not even have a step-ladder, nor material to cover the stock in the store to protect it from falling paint. These things were furnished by the store.

* * * * * * *

"In Magarian v. Southern Fruit Distributors et al., supra [146 Fla. 773, 1 So. 2d 861], we quoted, with approval, from 27 Am. Juris. page 485, Sec. 5, inter alia, as follows:

"'It has been held that the test of what constitutes independent service lies in the control exercised, the decisive question being as to who has the right to direct what shall be done, and when and how it shall be done. It has also been held that commonly recognized tests of the independent contractor relationship, although not necessarily concurrent or each in itself controlling, are the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price, the independent nature of his business or his distinct calling, his employment of assistants with the right to supervise their activities, his obligation to furnish necessary tools, supplies and materials, his right to control the progress of the work except as to final results, the time for which the workman is employed, the method of payment, whether by time or by job, and whether the work is part of the regular business of the employer.'"

Care must always be exercised in entering into any contract for the doing of work if it is desired that the person engaged to do the work shall have the status of an independent contractor. If the person for whom the work is to be performed is entitled to supervise the work and to prescribe the means to be employed for accomplishing results, the contractor will ordinarily be held to be an employee and not an independent contractor.

Quotation of Prices, or Offer to Sell

In the case of Nickel v. Theresa Farmers Cooperative Association, decided by the Supreme Court of Wisconsin, 20 N.W. 2d 117, the plaintiff, a lumber dealer, brought suit against the cooperative for work done in the razing of a building for the cooperative.

The cooperative filed a counterclaim alleging that it had entered into a contract with the plaintiff under which the plaintiff was obligated to furnish all of the lumber required for the building of a warehouse and that plaintiff had failed to furnish the lumber. This necessitated the

cooperative buying the lumber of other persons, and a loss was thereby suffered by the cooperative because it was required to pay higher prices for the necessary lumber.

The plaintiff in the lower court and on appeal contended that he had only quoted prices of lumber to the cooperative and that he had not made an offer to sell lumber to the cooperative. The trial court, however, held against this contention, thus upholding the validity of the counterclaim, and on appeal the judgment of the trial court was affirmed. In doing so the Supreme Court said in part:

> "A statement of prices of merchandise does not become an offer to be converted into a contract by an acceptance so long as the one quoting the prices intends to retain the right to sell the articles to any bidder and customer. In order to have such an agreement there must be a complete understanding that one is purchasing and the other selling; in other words, the minds of the parties must have met on the terms and conditions making up a contract. When the one quoting prices goes further upon the request of the other party and arranges for determining the amount of the goods to be bought and sold, he has made an agreement upon which a binding contract comes into being where he begins to deliver according to the quotations. He has then declared sufficiently, in a manner recognized by law his intention to and has entered into a valid and enforceable contract. He is then dealing with a specified customer with relation to specific articles in such manner as to bring him within provisions of sec. 121.04, Stats.
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> * * * * * *
>
> "There is no question but defendant wanted to enter into a contract with plaintiff and although the intent of plaintiff at that time may not be so apparent a careful examination of the words and acts forming the basis of the transaction justify the inference that plaintiff intended to make a definite offer to deliver the lumber necessary for the building at the prices quoted. He says: 'We then had plenty of material and wanted orders.'
>
> "Had plaintiff merely jotted down quotations of lumber prices in answer to an inquiry by Mr. Eckman the act could not be considered an offer. But when considered in conjunction with testimony that the plaintiff directed the defendant to get an architect to estimate the lumber needed, have it sent to him, and that he would then send the lumber over, it is sufficient to indicate a definite offer to supply the lumber necessary. Furthermore, the statement made by Mr. Nickel when he was apprised of the fact that he had not charged the quoted prices on the quantity of lumber delivered after September 6, that it should be changed 'to what it is supposed to be' is susceptible of the interpretation that he then recognized the agreement of September 6, 1941."

Good Faith - OPA Denied Injunction

In the case of Bowles v. Floodwood Co-operative Creamery Association, 62 F. Supp. 709, an injunction was sought to prevent the cooperative from violating Regulation No. 1 of the Office of Economic Stabilization. It was alleged that the cooperative had violated the regulation in -

> "'That on the 23rd day of April, 1945, and on divers dates since that time, defendant broke beef and veal carcasses and wholesale cuts, and in the course of trade or business received beef and veal from its customers and permitted such beef and veal to be stored in its cold storage lockers, which beef and veal was not graded or grade marked as required by said Regulation No. 1 * * * * *.'"

On account of the fact that the cooperative had acted in good faith, and as the action against the cooperative was based on voluntary disclosures which it made, and as the cooperative had discontinued the practice complained of, no injunction was granted. In refusing an injunction the court said in part:

> "By supporting affidavits it appears that the investigation made by plaintiff, and upon which this action is based, arose out of voluntary disclosures made to plaintiff by defendant with a view to obtaining information that would lead to an intelligent understanding of plaintiff's requirements and full compliance with said regulation. Further, 'That there was no intentional violation of such O.P.A. regulations * * * and in this instance the practice complained of was immediately discontinued * * * after knowledge of the same. That the officials in the Duluth-Superior District office of the Office of Price Administration have known that any failure or neglect * * * to comply with the O.P.A. regulations was involuntary and has been corrected since discovered, and have further known of the good faith and diligence on the part * * *' of defendant.
>
> "Nothing in the supporting affidavit or testimony of Joe Roth, investigator of the Duluth-Superior District Office of the Office of Price Administration, even suggests willful or intentional violation of the Stabilization Act.
>
> "Plaintiff's motion for a preliminary injunction is denied. There can be no doubt on the record here made of defendant's 'good faith and diligence'. The injury or wrong sought by plaintiff to be enjoined 'was corrected as soon as discovered'. Defendant's claimed good faith, uncontradicted by plaintiff, urges the exercise of this Court's discretion and refusal to issue an injunction under the particular circumstances here existing. In support of this conclusion see Hecht Company v. Bowles, etc., 321 U.S. 321, 64 S.Ct. 587, 88 L. Ed. 754.
>
> "The absence of evidence of continued violations, subsequent to defendant's being warned or informed that the regulation has been or is being violated, taken in conjunction with defendant's proof

that the violation was inadvertent and unintentional, together with an immediate promise to discontinue the infraction complained of, makes it obvious that a preliminary injunction would serve no useful purpose at this time.

"The propriety of and need for injunction is discretionary with the Court. Speten v. Bowles, etc., 8 Cir., 146 F. 2d 602. Inasmuch as the record makes it clear that defendant acted in good faith and immediately discontinued the practice complained of, no injunction will be granted, but an order will be entered 'retaining the case on the docket with the right of the Administrator, on notice, to renew his application for injunctive relief' if a violation should recur."

Fair Labor Standards Act - Employees of Electric Cooperatives

In the case of Phillips v. Meeker Cooperative Light & Power Association, 63 F. Supp. 733, George P. Phillips, as agent of James Watkins and others, employees, brought suit against the Meeker Cooperative Light and Power Association to recover overtime compensation under Section 7 of the Fair Labor Standards Act of 1938, 29 U.S.C.A. Sec. 207, and this suit was consolidated with an action brought by the Renville-Sibley Cooperative Power Association against Ray Denton and another for a declaratory judgment that the Fair Labor Standards Act was inapplicable to that association and for the purpose of restraining defendants from enforcing any rights under the act.

The Administrator of the wage and hour division of the United States Department of Labor intervened in both of the actions. The court held that office and maintenance employees of each of the two cooperative associations, both of which were financed by the Rural Electrification Administration, were under the Fair Labor Standards Act. The following quotation from the opinion in this case discloses the basis therefor:

"Were the employees of these two cooperatives employed in the maintaining of the power lines engaged in the production of goods for commerce? Manifestly, if these employees were engaged in an occupation necessary to the production of goods for commerce, then the question must be answered in the affirmative. Section 3(j) of the Act provides that 'an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.' It may be helpful to consider first whether any of the consumers of these two cooperatives are producers of goods for commerce, and, if so, the relationship which exists between these maintenance employees and such producers. In the Meeker case, among the consumers are four creameries located at Manannah, Rosedale, Forest City, and North Kingston, Minnesota. These four creameries are entirely dependent for their operation on the electrical current furnished by this cooperative. As an example, the creamery located at Manannah uses some seven motors in its operations. Approximately

one-half of all the butter produced in this creamery is shipped out of the State. The hatchery which obtains its electrical power from this cooperative operates its incubators and brooders with electrical current. It sells about ten thousand chickens a year and approximately 95 per cent of this number are shipped out of the State. There are about three hybrid seed-corn processors. While the hybrid seed-corn growers use the electricity purchased for general farming operations, they also use electrical power for the shelling and drying of hybrid seed corn. Most of the seed corn is sold locally to dealers who sell it intrastate. However, one of the growers produces and sells about eighty thousand bushels a year, and between one-fourth and one-third of this amount is shipped directly to purchasers in other States. There are some three fur farms, and they use electrical power in grinding animal food, lighting the buildings and grounds, and pumping the necessary water for the animals. Two of the breeders ship their pelts to other States. The third ships a substantial amount in interstate commerce. Without considering the farmers who raise various types of grains and produce which eventually find their way into interstate commerce, either directly or indirectly, it seems clear that the consumers heretofore referred to are producing goods for interstate commerce. The butter, the seed corn, the chicks, and the fur pelts move out of the State and are therefore subject to the Act. The electrical current supplied by the defendants furnishes the power and the light with which all carry on these operations. If the current is cut off, the operations cease. Without suitable facilities in serviceable condition, such as poles with cross-arms, the wires, transformers, and other electrical devices, electrical current could not get to these consumers, and it seems evident that the maintenance crew are directly responsible for the electrical energy's arriving to the consumer. Their services in repairing and maintaining the lines are not only necessary but indispensable to the continuity of this service. Without them, no consumer would be safe in relying on this power for his operations. Daily in their activities in repairing, maintaining and servicing these lines, they insure the uninterrupted flow of electrical energy to the consumer. Their work, therefore, is directly necessary to the production of goods which the consumer sends directly or indirectly into the channels of commerce. Such relationship is not remote or tenuous, but direct and vital. The causal connection between their work and the production of goods for commerce by the aid of electrical energy is just as direct as that which exists between the engineer who services the steam boiler in a steam plant and the production of goods where steam is the power utilized for that purpose. The fact that these maintenance employees are not engaged in the physical process of producing goods for commerce is not determinative of their rights in view of the plain and unambiguous language of the statute, which embraces all employees whose work is necessary to the production of goods for commerce. The relationship, therefore, between the men who insure the continued flow of electrical energy and the producers of goods who use electrical energy in the production of goods for commerce seems so close and immediate that it must be considered to be the one which is embraced within the intent of Congress when it

extended coverage of the Act to these employees necessary to the production of goods for commerce. Generally speaking, the test, of course, is whether the employees' work bears such relationship to the production of goods that it is necessary thereto. When Congress provided that the employees necessary to the production of goods for commerce should be within the Act, it unmistakably indicated that the factual basis is less rigid and narrow for such a relationship than that which would be required in order to justify a finding that an employee was engaged in commerce. Davila v. Porto Rico Ry. Light & Power Co., 1 Cir., 143 F. 2d 236. The analogy between the instant situation and the facts which were before the Supreme Court in Kirschbaum Co. v. Walling, 316 U.S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638, and Warren-Bradshaw Co. v. Hall, 317 U.S. 88, 63 S. Ct. 125, 87 L. Ed. 83, amply supports the conclusions indicated herein. It would seem that the activities of the maintenance employees of these cooperatives bear as 'close and immediate tie with the process of production for commerce' as the building maintenance workers in Kirschbaum Co. v. Walling, supra, 316 U.S. at page 525, 62 S. Ct. at page 1121, 86 L. Ed. 1638, and the members of the rotary drilling crew of an independent contractor who drilled the oil wells to a depth short of the oil sand stratum in Warren-Bradshaw Co. v. Hall, supra. Granted that it may be difficult to determine with any mathematical certainty the line of demarcation between employees who are too remote from the production of goods for commerce and those who should be considered direct and immediate to such production so as to be considered necessary within the meaning of the Act, it would seem that, in light of the broad construction given to this remedial legislation by the Supreme Court in the cases just referred to, any question as to the status of these employees under the Act has been set at rest. See, also, Bracey v. Luray, 4 Cir., 138 F. 2d 8; Schmidt v. Peoples Telephone Union, 8 Cir., 138 F. 2d 13; Reynolds v. Salt River Valley Water Users Assn., 10 Cir., 143 F. 2d 863; New Mexico Public Service Co. v. Engel, 10 Cir., 145 F. 2d 636; Walling v. Roland Electrical Co., 4 Cir., 146 F. 2d 745.

"Although the consumers in the Renville-Sibley case do not embrace any creameries or fur farms, there is one hybrid seed-corn processor and the rendering plant which depend on electrical current furnished by this cooperative for substantially all of their operations. As stated heretofore, a substantial part of the products of the rendering plant is directly shipped into interstate commerce and a substantial part of the electrical energy sold by this cooperative is purchased by this consumer. The causal connection between the work of the maintenance employees for Renville-Sibley Cooperative and the production of goods for commerce by the rendering plant is so direct, immediate and substantial that there can be no serious doubt but that the employees of this defendant who directly make it possible for the plant to operate with electricity are within the Act.

"But it is urged, particularly with reference to the Meeker case, that the percentage of interstate business of its consumers is

relatively so small that the doctrine of de minimus should apply. It points out that the Manannah creamery buys about .23 per cent; the Rosedale creamery .505 per cent; the Forest City creamery .55 per cent, and the North Kingston Creamery Association .33 per cent of the annual sales of this defendant; that the Civil Aeronautics Authority uses approximately one thousand kilowatt hours of electrical energy per month, which is about .052 per cent of the defendant's sale of electrical energy during the month. Further, that the other consumers who produce goods for commerce such as the hybrid seed-corn processors and fur farms use a trifling amount of the total electrical energy sold. As an example, one of the hybrid seed-corn processors uses about .15 per cent of the annual sales of electrical energy per year by this defendant. However, a consideration of the well-reasoned cases clearly indicates that the defendant's position in this regard is not sound. The use of the electrical current by the producers of goods for commerce referred to is not intermittent or sporadic, but regular and continuous. There is no indication in the Act that Congress assumed to make any distinction as to the volume or amount of goods produced by any producer. The test, therefore, is not the amount or volume of goods produced by the consumer for commerce; it is sufficient that the production is constant and consistent. The following cases fully support the views indicated: Schmidt v. Peoples Telephone Union, supra; New Mexico Public Service Co. v. Engel, supra; Sun Publishing Co. v. Walling, 6 Cir., 140 F. 2d 445, certiorari denied, 322 U.S. 728, 64 S. Ct. 946, 88 L. Ed. 1564; Strand v. Garden Valley Telephone Co., D.C. Minn., 51 F. Supp. 898; Muldowney v. Seaberg Elev. Co., D.C., 39 F. Supp. 275. Furthermore, attention may be called to the scope of the stipulation in both cases, wherein it is recited that a substantial portion of the goods produced, raised and processed by the consumers other than churches, homes and schools, find their way directly or indirectly into interstate commerce.

"The recital of facts regarding the work of the office employees in both of these cooperatives should dispel any doubt as to the essential connection between them and the production of goods for commerce. The business of these cooperatives is to furnish electrical current to their consumers. All of these employees are of necessity directing their activities to the successful consummation of that objective -- the maintenance employees to keep the lines in such condition that the electrical energy will flow without interruption; the office employees to do the clerical and stenographic work necessary for the conduct of the company's public utility business. The office employees are an integral part of the business of the cooperative. It would seem, therefore, that all of them are necessary to the fulfillment of the cooperative's contract to furnish electrical energy to their consumers and the maintenance of a business organization which continuously supplies the electrical power which produces goods for commerce. Walton v. Southern Package Corp., 320 U.S. 540, 64 S.Ct. 320, 88 L. Ed. 298; Holland v. Amoskeag Machine Co., D.C., 44 F. Supp. 884; Fleming v. Swift & Co., D.C., 41 F. Supp. 825, affirmed 7 Cir., 131 F. 2d 249; Fleming v. Atlantic Co., D.C., 40 F. Supp. 654, affirmed 5 Cir.,

131 F. 2d 518. But, moreover, it must follow that these office employees are themselves engaged in commerce and in producing goods for commerce. The correspondence, reports, and other documents which they prepare, handle, and forward to the St. Louis office of the R.E.A. constitute commerce. The very nature and character of the supervision which the R.E.A. demands over the expenditures of the funds allotted to these cooperatives requires a continuous and constant flow of articles in commerce. This seems evident from the undisputed facts. Correspondence, reports, fiscal statements, checks and other documents pass to and from the St. Louis office and are 'goods produced for commerce.' The Act defines goods to mean 'goods * * *, wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof.' §3(i). As stated in Fleming v. Jacksonville Paper Co., 5 Cir., 128 F. 2d 395, 398: '* * * Those who work either at selling or delivering across State lines, or at buying and receiving across State lines, are employed in commerce, whether they write the letters, keep the books, or load and unload or drive the trucks. * * *' And the purchase of goods to be transported across States lines is interstate commerce as truly as the transportation itself. Currin v. Wallace, 306 U.S. 1, 59 S.Ct. 379, 83 L. Ed. 441 * * *.'

"Furthermore, it may be pointed out that these office employees keep the records of purchases made without the State. They handle the correspondence in ordering the goods, receiving invoices, and mailing out the checks in payment thereof. True, their time is also occupied with office work which is intrastate in character, but a substantial amount of their time is occupied with duties pertaining to voluminous correspondence and transmission of documents and records to St. Louis and the clerical work resulting from the purchase of goods without the State. That they are to a substantial extent engaged in commerce seems reasonably free from doubt.

"Defendants urge that they are local retail or service organizations. They contend that they are merely buying electrical current and selling it, and that that which is sold passes out of existence in this State. They contend, therefore, that the employees come expressly within the language of Section 13(a) (1) (2) of the Act. Section 13(a) provides: 'The provisions of Sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, * * *.'

"Under Section 13(a) (2), the exemption embraces 'any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.'

"It is not necessary to indulge in any extended discussion with reference to the alleged applicability of Section 13(a) (1). Obviously, these employees are not engaged in performing any work incidental to retail sales. These cooperatives are not engaged in making any retail sales of any chattels, and the maintenance and

office employees are not engaged in effecting any sales. It seems clear that the relationship of vendor and vendee does not exist between the cooperatives and the consumers. The cooperatives do not pass title to anything. Brown v. Minngas Co., D.C., 51 F. Supp. 363. One must consider the usual concept of an employee engaged in a retail capacity in determining the applicability of the exemption referred to. It would indeed be a strained construction of this section of the Act if it were concluded that maintenance employees or office employees of an electric light company furnishing electrical energy were engaged in a local retailing capacity within the meaning of the Act. In Reynolds v. Salt River Valley Water Users Assn., 10 Cir., 143 F. 2d 863, it was held that employees engaged in distributing the water and directing it upon the users' lands were not engaged in making sales. In Title 29, Chapter V, Code of Federal Regulations, Part 541, the Administrator has defined an employee engaged in a local retailing capacity as follows:

"'Section 541.4 -- Local retailing capacity. The term "employee employed in a bona fide * * * local retailing capacity" in section 13(a) (1) of the act shall mean any employee --

"'(A) who customarily and regularly is engaged in

"'(1) making retail sales the greater part of which are in intrastate commerce; or

"'(2) performing work immediately incidental thereto, such as the wrapping or delivery of packages, and

"'(B) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 per cent of the number of hours worked in the workweek by such nonexempt employees.'

"These employees do not meet any of the tests as set forth in the Administrator's definition, nor do they come within the ambit of any usual or commonly accepted interpretation of the language used in the section.

"This brings us to Section 13(a) (2). Are the employees engaged in a retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce? At first blush, it might seem reasonable to conclude that a local cooperative company engaged in furnishing electric current to consumers wholly in the State comes within the scope of the exemption. But the history of the Act and the well-considered decisions which have dealt with similar questions seem to have dispelled any doubt as to the scope of the exemption relied upon. These cases are practically unanimous that the retail or service establishment exemption is limited in its application to such establishments as the corner grocery, the drug store, local garage, barber shop, and local service concerns of that character. Schmidt v. Peoples Telephone Union, supra; New Mexico Public Service Co. v. Engel, supra; Reynolds v. Salt River Valley

Water Users Ass'n, supra; Walling v. Roland Electrical Co., supra; Bracey v. Luray, supra; Brown v. Minngas Co., supra; Strand v. Garden Valley Telephone Co., supra. As stated in the Schmidt case (page 15 of 138 F.2d): '* * * We do not think that Congress used the term "service establishment" in its broad sense, which would include public utilities such as railroads, gas and electric companies, telephone and telegraph companies, and the like. In its narrower sense the term applies to an altogether different class of businesses, such as restaurants, hotels, laundries, garages, barber shops, beauty parlors, funeral homes, shoe-shining parlors, clothes pressing clubs, and the like. That the exemption clause to which we are now referring applies to the latter class of businesses is supported by Interpretative Bulletin No. 6, issued by the United States Department of Labor, Wage and Hour Division, in June, 1941, and also by the following: Stucker v. Roselle, D.C. Ky., 37 F. Supp. 864, 867; Fleming v. A.B. Kirschbaum Co., 3 Cir., 124 F. 2d 567, 572, affirmed sub nomine Kirschbaum Co. v. Walling, 316 U.S. 517, 526, 62 S. Ct. 1116, 86 L. Ed. 1638; Wood v. Central Sand & Gravel Co., D.C. Tenn., 33 F. Supp. 40, 46; Lorenzetti v. American Trust Co., D.C. Cal., 45 F. Supp. 128, 138.'

"In the Garden Valley Telephone Co. case, the following excerpt may be noted (page 903 of 51 F. Supp.): 'In its broad sense the term "service establishment" includes public utilities such as railroads, gas and electric companies, telephone and telegraph companies, and similar organizations. In its narrower sense the term is applicable to a different class of businesses such as hotels, garages, barber shops, laundries, tailor shops and the like. That the exemption clause to which I have just referred applies only to the latter class, or to the term in its narrower sense, is supported by: Stucker v. Roselle, D.C. Ky., 37 F. Supp. 864, 867; Fleming v. A. B. Kirschbaum Co., 3 Cir., 124 F. 2d 567, 572, affirmed sub nomine A. B. Kirschbaum Co. v. Walling, 316 U.S. 517, 526, 62 S. Ct. 1116, 86 L. Ed. 1638, and Interpretative Bulletin No. 6 issued by the United States Department of Labor, Wage and Hour Division, in June, 1941. Interpretative Bulletins, such as the one referred to, are by no means binding upon the courts, but I believe they should be given consideration and that they do carry weight.'

"Moreover, the Administrator's Interpretative Bulletin No. 6 on retail or service establishments lends weight to the contention of the intervener herein that the exemption relied upon is not applicable under the facts herein. Paragraph 29 of that bulletin reads: 'Numerous letters have been received from banks; * * * telephone companies; * * * water-supply companies; electric and gas utilities; * * *. Each asserts that it is engaged in rendering service. Although we recognize that the foregoing companies perform service, it is nevertheless our opinion that establishments engaged in such businesses are not in the ordinary case sufficiently similar in character to retail establishments to be considered service establishments within the meaning of section 13(a) (2).'

"Also in paragraph 31 the Administrator says: 'Many of the foregoing types of business enterprise (e.g., banks, insurance companies, newspapers, utilities, etc.) could have been easily designated for specific exemption and that fact is another reason for our conclusion that such enterprises were not intended to be covered by general language which seems forced and artificial in its application to such cases.'

"In paragraph 32 the Administrator says: 'In addition, it should be noted that the provisions of certain of the specific exemptions provided in section 13 buttress our opinion in respect of many of the foregoing classes of businesses. * * * Congress designated in section 13(a) (9) certain special classes of utilities for specified exemption. If Congress had intended utilities in general to be considered as service establishments, there would, of course, have been no need for any such exemption. Section 13(a) (11), enacted August 9, 1939, exempted switchboard operators employed in any public telephone exchange which has less than 500 stations. It would be difficult to rationalize the passage of such a special amendment if utilities as a whole were intended to be considered as service establishments.'

"As stated by the Supreme Court in Overnight Motor Co. v. Missel, 316 U.S. 572, 62 S.Ct. 1216, 86 L. Ed. 1682, in commenting on the Administrator's interpretation of the Fair Labor Standards Act (Note 17, 316 U.S. at pages 580, 581, 62 S.Ct. at page 1221): '* * *While the interpretative bulletins are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application.'

"There is no merit to the suggestion that because under Section 13(a) (6) of the Act employees engaged in agriculture are exempted, and under Section 13(a) (10) of the Act certain processing occupations are exempted, the employees of this cooperative therefore cannot be held to be within the Act because they are merely aiding producers who are themselves exempt from coverage. There is ample evidence to justify the finding that these outside and inside employees are engaged in work necessary to the production of goods for commerce by consumers other than those engaged in farming and processing occupations. But that aside, it would seem that the fact that the exemptions have been granted to farmers and certain processors does not mean that such persons or concerns may not be producers for commerce. On the contrary, the exemption granted by Congress would imply that they would be assumed to be producers for commerce, in certain situations at least, and hence the necessity of an express exemption if they were to be exempted from the requirements of the Act. Moreover, it must follow that none of the defendant employees are 'employed in agriculture' and none of them are engaged in handling, etc., agricultural products in 'their raw or natural state.' Nor were they engaged in the 'making' of butter products. Exemptions must be strictly construed, and the nature of

the work performed by these employees falls far short of coming within the scope of the exemption referred to. Colbeck v. Dairyland Creamery Co., S.D., 17 N.W. 2d 262.

"Granted that it may be impossible to determine the exact portion of the time which an employee may devote in maintaining and repairing lines exclusively serving a consumer who produces goods for commerce, as distinguished from the maintenance and repair of lines serving, for instance, a school or a church, such fact should not under the circumstances herein militate against the coverage of the maintenance employees under the Act. The light and power system operated by these defendants must be considered as a unit. Although a breakdown of any line transmitting power and light may cripple the activities of a nonproducer for commerce, as well as a producer, the work of the employees in maintaining and repairing the lines necessarily contributes to the continuance of power to all classes of consumers. The maintenance employees must direct their activities, among their other duties, to the general maintenance and repair of the entire system. Under the circumstances, therefore, it seems fair to find that the work of such employees is necessary from day to day to the consumer who produces goods for commerce and to whom substantial damage may result if the power upon which he is dependent is not constant.

"Findings of fact and conclusions of law in harmony herewith may be presented upon five days' notice. The question of the amount of overtime, liquidated damages and attorneys' fees may be considered at that time."